INDEX

	Page
OPINION BELOW	1
QUESTIONS PRESENTED	2
STATEMENT	2
ARGUMENT	
A. A rational basis exists for denying abortions on psychiatric grounds	5
B. The instant cause is not justiciable, since it is not a case in controversy	12

Table of Cases

Berman v. *Parks*, 348 U.S. 26 (1954)	11
Shelton v. *Tucker*, 364 U.S. 479 (1960)	11
Poe v. *Ullman*, 367 U.S. 497 (1961)	11
People ex rel. Hanrahan v. *White*, 52 Ill. 2d 70 (1972)	5
Commonwealth of Massachusetts v. *Mellon*, 262 U.S. 447 (1923)	12
New Jersey v. *Sargeant*, 269 U.S. 328 (1925)	12
Scinks v. *Georgia*, 401 U.S. 144 (1971)	13
Sears Roebuck v. *Carpet Layers*, 397 U.S. (1969)	13

Miscellaneous

Committee Comments, Smith Hurd Annotated Statutes of Illinois, Ch. 38, Sec. 23-1	7
S. Halleck, *Medical Opinion*, December 1971, page 48	9
Resnik and Wittlin, Abortion and Suicidal Behavior: Observation on Concept of "endangering the Mental Health of the Mother," Psychiatry Digest, December, 1971, page 20	20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6926

SUSAN SPLINTER,

Petitioner

VS.

EDWARD V. HANRAHAN,
State's Attorney of Cook County, Illinois,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 52 Ill. 2d 36 (1972) and is contained for the Court's convenience in Appendix A.

QUESTIONS PRESENTED

Whether the Illinois Supreme Court's interpretation of the phrase "necessary for the preservation of the woman's life," found in the Illinois Abortion Statute, as excluding abortions based on psychiatric grounds is in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Whether the petitioner presents an actual case in controversy for determination by this Court.

STATEMENT

Susan Splinter, a minor, became a ward of the Juvenile Court upon the basis of supervision and neglect petitions. Pursuant to the finding on these petitions the Court appointed the Illinois Department of Children and Family Services as Guardian-Administrator of the ward, Susan Splinter. While under this guardianship Susan Splinter became pregnant and was in her first trimester of cyesis. An examination of the ward was made by two psychiatrists and one gynecologist, and in their opinion she was suffering from suicidal symptoms. The Medical Certification Board at Michael Reese Hospital determined that Susan Splinter was "suicidal" and that it was in their "medical judgment, necessary to abort the child in order to save the mother's life." The Guardian-Administrator refused his consent to the performance upon his ward despite the certification of Michael Reese Hospital. The position of Richard Layman, as Guardian-Administrator, was that suicidal symptoms do not establish a valid medical basis for permitting an abortion. Susan Splinter,

through her attorneys, petitioned the Circuit Court of Cook County, Juvenile Division, for an "Order on the Guardian of Susan Splinter to permit an abortion."

After an evidentiary hearing upon the issue of the necessity of an abortion to preserve the life of Susan Splinter, the Court found that since its ward has suicidal tendencies, an abortion was necessary to preserve her life. According to the Court the psychiatric evidence presented established the predictability of human behavior with sufficient certainty to show that in the absence of an abortion, the death of Susan Splinter was *"highly likely."*

On January 21, 1972, the trial court entered its order directing Richard S. Layman, Guardianship-Administrator, Department of Children and Family Services, to immediately and without delay consent and arrange for a therapeutic abortion to be performed upon the person of Susan Splinter by a physician licensed to practice medicine in the State of Illinois in a licensed medical facility.

Before enterng the aforesaid order the Court found that due to suicidal symptoms, a therapeutic abortion was necessary to preserve the life of Susan Splinter and further that "psychiatric grounds" is a condition included within the purview of those " . . . necessary for the preservation of the woman's life and is, therefore, the basis for the affirmative defense to the crime of abortion." Ill. Rev. Stat., Ch. 38, Sec. 23-1 (See Appendix C).

Thereafter on January 22, 1972, the respondent presented to the Supreme Court of Illinois a Motion for Leave to File a Petition for Writ of Mandamus or Prohibition directed to Judge White. The Court stayed Judge White's order until January 26, 1972, the date set for oral arguments in the matter. Immediately after the presentation

of arguments the Court ordered the writ to issue, but no opinion was given. On January 31, 1972, the petitioner again appeared before Judge White in the Juvenile Court and moved that he vacate the guardianship of the Illinois Department of Children and Family Services. It was asserted that since the agency knew of her mental problems but did nothing to aid her it would be in her best interests to be released to the care and custody of her mother. Judge White ordered her release to her mother's custody and vacated the guardianship. Thereafter the petitioner left the State of Illinois to secure the therapeutic abortion that she sought.

This petition for a Writ of Certiorari was filed a number of months after she received the abortion.

ARGUMENT

A.

A RATIONAL BASIS EXISTS FOR DENYING ABORTIONS ON PSYCHIATRIC GROUNDS.

The petitioner in seeking a Writ of Certiorari from this Honorable Court to review the decision of the Illinois Supreme Court in People ex rel. Hanrahan v. White, 52 Ill. 2d 70 (1972) (see Appendix A) does not challenge the constitutionality of the Abortion Statute of the State of Illinois (Ill. Rev. Stat., 1971, Ch. 38, Sec. 23-1) (See Appendix B). Rather it raises the issue of whether the decision of the Supreme Court, in deciding that the legislature intended in the phrase "necessary for the preservation of the woman's life" to mean that lawful abortions could be performed only when there exists a real, impending physical threat to the life of the mother, violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The General Assembly of Illinois does not recognize the medical procedure of abortion as a lawful act. This is evidenced by paragraph "A" of the Abortion Statute. However, in paragraph "B" of the statute, there is one recognized exception to general prohibition, that is, where the abortion is, "necessary for the preservations of the female's life." The Supreme Court in examining what the legislature intended by the exception researched the history of Abortion Statutes in Illinois:

> Respondents urge that in the light of advanced medical and psychiatric technology, grounds for a therapeutic abortion are, by implication and intendment, encompassed within section 23-1. Legislative history does not support this reasoning. Subsequent

to the enactment of section 23-1, which became effective on January 1, 1962, there was introduced in the 76th General Assembly (1969) the following proposed revisions and amendments thereto: Senate Bill 603 . . . "is likely to result in the serious permanent impairment of the physical health of the woman; or the serious impairment of the mental health of the woman . . ." (tabled on third reading); House Bill 663 . . . "is likely to result in the death of the woman, or the serious permanent impairment of the physical health of the woman, or the serious permanent impairment of the mental health of the woman . . ." (failed to pass); House Bill 1407 . . . "The continuance of the pregnancy would gravely endanger and impair the physical or mental health of the female . . ." (failed to pass: 91-38).

Additionally, similar legislation was introduced in the 77th General Assembly (1971) as follows: House Bill 043 — "The continuance of the pregnancy would gravely endanger and impair the physical or mental health of the female . . ." (tabled in Judiciary Committee); House Bill 3076 — "if the abortion is necessary for the mental or physical well being of the woman . . ." (in Judiciary Committee).

As we see, there have been repeated attempts to have the legislature engraft the concept of mental or psychiatric grounds for a legal therapeutic abortion. These attempts indicate that section 23-1 (b), as originally passed and now in force, was not intended to and does not encompass mental or psychiatric grounds. Otherwise, such revisions or amendments would have been unnecessary.

This position is further buttressed by the fact that the original draft of the abortion statute in 1961, provided for three affirmative defenses to the crime of abortion: a pregnancy that would endanger the life or gravely impair the health of the mother; that the fetus would be

born with grave and irremediable physical or mental defects; or that the pregnancy was a result of rape or aggravated incest. Due to the inclusion of these defenses, the entire Criminal Code of Illinois was opposed and criticized. The drafters of the section, bowing to this overwhelming pressure, deleted these provisions and drafted the Statute in its present form. Committee Comments, Smith Hurd Annotated, Ch. 38, Sec. 23-1, page 554. It is apparent that the legislature of Illinois intended but one meaning be attached to the phrase "necessary for the preservation of the life," that exception directed to death anticipated from natural causes. Suicide is not such a natural cause.

A threat to commit suicide also fails to satisfy the requirement of "necessity." If such threats were sufficient, then the clear intent of the legislature would be subject to easy circumvention. But as discussed above the intent of the legislature is strong and clear, in that, the exceptions were to be narrowly construed. For the State of Illinois is committed to preserving the lives of its citizens. This posture is equally applicable to the fetus, which is a being in existence and which at the very least has the potential for human life.

The decision of the Court was based upon the intent of the legislature. The dissenting opinion, however, overlooks the abundance of evidence establishing legislative intent and attacks the decision of the Court on two theories. The first criticizes the Court for relying on an 1891, Wisconsin case, Hatchard v. State, 79 Wis. 357, 48 N.W. 380, in interpreting the statute. However, the Illinois statute has retained the same form as the statutes in effect at the time of the Hatchard decision. The Court could well take notice that the legislature also read the

statute in this manner and desired to retain this narrow exception to the abortion statute. The second basis of criticism is simply:

> "But the fact that the legislature refused to change the ground of affirmative defense from danger to life to impairment of health does not, in my opinion, indicate or even suggest an intention to exclude from the existing statute the possibility of danger to life from mental causes."

This clearly ignores the resources available to the court in determining the legislature's intent. This posture might have been proper if these resources were not available.

Having established the clear intention of the legislature the next question posited is whether there is a rational basis for the state to restrict lawful abortions to those based on natural physical causes. The scientific papers introduced by the respondent at the evidentiary hearing, although this issue was not reached by the Illinois Supreme Court, are clearly indicative of emperical studies conducted by prominent medical authorities in the field. These studies clearly establish that a rational distinction exists on the scientific level.

An application of the lessons of these emperical studies, as stated by Dr. Bernstein, who testified on behalf of the respondent, is that the risk of suicide is so slight that in terms of probability an abortion can never be considered necessary to preserve a woman's life. The term "necessary" implies that an abortion must be the only available treatment and that no other adequate treatment modalities exist, in order to come within the medical grounds exception of the Abortion Act. Certainly common sense requires that we recognize that mental health problems in general and the problem of suicide in particular are not solely dependent upon abortion techniques.

Nor can it be maintained that a non-pregnant woman suffering from suicidal symptoms, who is subsequently impregnated, can have her emotional or mental disorders cured by a therapeutic abortion. Yet, in essence, the position forwarded by the petitioner is that subjective symptoms of suicidal tendencies coupled with a request for an abortion are grounds upon which a woman may be certified for an abortion. The total lack of probative evidence to establish a causal connection or reasonal nexus between pregnancy and suicidal tendencies, clearly establishes that as grounds for abortion, the necessatorial element is utterly incapable of proof or verification. Certainly in the instant petition the absence of proof of causation, establishes a reasonable basis for allowing abortions only when physical maladies so threaten the life of the impregnated female that an abortion is necessary to save her life.

On the precise question of whether suicidal symptoms seriously threaten the mother's life, numerous medical articles have been written. In Medical Opinion, page 48, December, 1971, Seymour L. Halleck, M.D., stated the following at page 50:

> "When the psychiatrist writes a report stating that the patient will endanger her life by carrying a child to term he is on shaky intellectual grounds. Many women with serious emotional disturbances who are reluctant to have a baby never contemplate suicide; their lives are not in danger. Other emotionally disturbed women threaten suicide, but it is quite difficult to evaluate the seriousness of their threats.
>
> "Psychiatrists know that even when a woman sincerely threatens suicide, she generally can be treated by traditional means without resort to abortion. They are also aware that once the patient realizes

there are no alternatives, she probably will respond to psychotherapy, drug therapy or hospitalization."

Again, in *Abortion and Suicidal Behaviors; Observation on Concept of "Endangering the Mental Health of the Mother."* Psychiatry Digest, December, 1971, page 20, Resnik and Wittlin discussed the relationship between abortion and suicidal behavior at page 21:

> "It (abortion) is employed most frequently in rela'ion to the risk of serious suicide attempt during pregnancy. However, there is evidence that the suicide rate for pregnant women is actually less than that for non-pregnant women to be a significant threat to her life. . . . Of a total of 202 recorded female suicides in the age group 13 to 50 years, only one (0.5%) was conclude that the fetus in utero offers some intrinsic protection against suicide, perhaps based upon a mother's inability to take the life that she is nurturing within her . . . It is obvious that endangerous the mental health of the mother is a convenient rubric that American society has evolved and expressed through its laws for shunting its responsibilities to the shoulders of the psychiatric profession."

When the above is considered it is apparent that there are other possible avenues of relief available that will not "necessitate" the destruction of the unborn fetus. It is for this precise reason that the cases cited by the petitioner are of no assistance in the instant case. The common attribute of the cited cases within which this Honorable Court held that State statutes were unconstitutional as violative of the equal protection clause are: "in absence of legislative intent establishing some rational basis of distinction", and, an unlawful attempt on the part of the various legislatures to restrict a citizen in the exercise of his constitutional rights. Both of these important factors are noticably absent at bar.

The respondent therefore asserts that since it is well established that a Sovereign may legislate in the areas of public health, public safety, and morality, under its police powers, its legislature may rationally restrict the performance of abortions to those situations in which the pregnancy so physically endangers the life of the mother, that the abortion is the only means of saving her life. *Berman* v. *Parker,* 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954). The sovereign state of Illinois has adopted the posture that it will protect the lives of all of its citizens. The State's power to protect children is a well established constitutional maxim. See, *Shelton* v. *Tucker,* 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960). That this power should be used to protect a fertilized embryo or fetus during the period of gestation embodies no logical infirmity, but falls within the plenary powers of government. *Poe* v. *Ullman,* 367 U.S. 497 at 539, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (Harlan, J., dissenting). This is not the situation where the State legislates upon the personal decision of conception, but rather protects a being that has the potential for human life. Though the State has recognized that there is one situation where it will yield this power, that situation is to be narrowly limited to when the life of the mother will be lost if forced to carry the fetus to term. As previously discussed this position is founded upon compelling state interest in protecting the lives of its citizens and upon scientific evidence. For these reasons therefore, the abortion statute of Illinois does not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

B.

THE INSTANT CAUSE IS NOT JUSTICIABLE SINCE IT IS NOT A CASE IN CONTROVERSY.

Intervention by this Honorable Court to grant a Writ of Certiorari is to be limited to only those causes in which there exists an actual case and controversy, as provided by Article 3, Section 2 of the Constitution of the United States. This Court does not have the power to pronounce an abstract opinion upon the constitutionality of a valid State law. The Petitioner must establish an actual controversy in which the constitutionality of a sovereign's statute is drawn into question in a truly adversarial context. *Commonwealth of Massachusetts* v. *Mellon,* 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923); *New Jersey* v. *Sargent,* 269 U.S. 328, 46 S. Ct. 122, 70 L. Ed. 289 (1925).

Susan Splinter brings this action not as a member or representative of a class, but as an individual. She seeks relief from a decision of the Supreme Court of Illinois; in which the Court refused to permit an order of a judge of the Circuit Court of Cook County, authorizing a 15 year old female minor, a ward of the State, to receive an abortion, to stand. The Illinois Supreme Court issued its order on January 26, 1972. On January 31, 1972, Judge White, of the Circuit Court of Cook County, ordered the release of Susan Splinter from the custody and control of the State. She thereupon flew to the State of New York to procure the desired abortion. More than two months passed before the petitioner sought relief before this Honorable Forum.

This Court has consistently held that it would exercise its power of judicial review only on matters of necessity, and consistently refrained from passing on the con-

stitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is necessary. *Sanks* v. *Georgia*, 401 U.S. 144, 91 S. Ct. 593, 27 L. Ed. 2d 741 (1971); *Sears, Roebuck* v. *Carpet Layers*, 397 U.S. 655, 90 S. Ct. 1299, 25 L. Ed. 2d 615 (1969). It is thus apparent that since the petitioner has received the relief which she had sought, there is no constitutional issue which must of necessity be decided by this Honorable Court.

For these reasons the respondent suggests that the issue sought to be raised is moot as to the petitioner since it fails to present an actual controversy before this Honorable Court. The petition for a Writ of Certiorari should therefore be denied on that ground.

CONCLUSION

The People of the State of Illinois respectfully request that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

EDWARD V. HANRAHAN,
State's Attorney of Cook County, Illinois,
500 Chicago Civic Center,
Chicago, Illinois 60602,

Attorney for Respondent.

ELMER C. KISSANE,
ROBERT C. SAMKO,
Assistant State's Attorney,
Of Counsel.